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right to be protected? Questions have not unfrequently arisen respecting the burial place of the dead, and nearly all the cases are of that nature. In such cases the equitable jurisdiction of the courts has usually been invoked. See the remarks of POTTER, J., in *Pierce v. Swan Hill Cemetery*, already quoted. In the same case it is said that, in such cases "no common-law action could avail much. The owner of the lot might have trespass *quare clausum*, &c., but he could only recover damages in money. He might have an *actio* of detinue for the body, or so much earth, &c., taken away; or, perhaps, might have replevin; * * * but it is easy to see that neither form of action affords a sufficient remedy, or could, with any certainty, restore the body to the proper custody. Equity only can give a full and complete remedy, and we think the jurisdiction is fully adequate to it." It is more than doubtful whether replevin or detinue will lie. See *Guthrie v. Weaver*, 1 Mo. App. 141. It is believed that no case can be cited directly holding that either will lie. It seems clear that trover will not lie. See 2 East P. C., ch. 16, sect. 89, *supra*. The right of sepulture in England is a common-law right, but the mode of burial is a subject of ecclesiastical cognisance: *Rex v. Coleridge*, 2 B. & Ald. 806. "It is to be observed that in every sepulchre, that hath a monument,

two things are to be considered, viz.: the monument, and the sepulture or burial of the dead. The burial of the *cadaver* (that is *caro data vermibus*), [*a cadendo*] is *nullius in bonis*, and belongs to ecclesiastical cognisance; but as to the monument, action is given (as hath been said) at the common law for defacing thereof." See 3 Coke's Inst. 203.

"All matrimonial and other causes of ecclesiastical cognisance, belonged originally to the temporal courts (*vide* the case of Legitimation and Bastardy, Sir J. Davies's Rep. 140, and his argument in the case of *Præmunire*, id. 273); and when the spiritual courts cease, the cognisance of such causes would seem, as of course, to revert back to the *lay* tribunals." Per KENT, Ch., in *Wightman v. Wightman*, 4 Johns. Ch. 343, 347. As we have no ecclesiastical courts in this country, burial rights, such as are applicable to our condition, must, if enforced at all, be enforced by the temporal courts, and, as already stated, courts of equity are the only ones that can give full and complete relief. See, generally, the report of Mr. Ruggles, above cited. See also *Fox v. Gordon*, 11 Weekly Notes Cases 302.

From every point of view the principal case seems founded both upon principle and authority.

MARSHALL D. EWELL.

Chicago.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

HUNTER v. MOUL.

The mere acceptance from a debtor of his own note or the note of a third person, on account of an antecedent debt, is not a payment of such debt, but in the absence of a special agreement must be considered as conditional payment or as collateral security.

When the transfer of a note is a conditional payment it is necessary to inquire what the true condition was, and if not fulfilled by the person accepting it what injury, if any, has resulted from the breach.

If the debtor transfer the note by delivery only without endorsement he is not within the strict rule of the law merchant requiring notice of non-payment, and is only relieved from his original indebtedness by the absence of such notice, so far as he can show actual damage by laches of the creditor.

The fact that the creditor upon non-payment of the note, accepted from the maker in lieu thereof a draft, which was subsequently also protested, will not relieve the original debtor unless a loss resulted to him by reason of such exchange.

APPEAL from a judgment entered on the report of a referee. The important facts found by him are substantially these: Hunter was indebted on book account to Moul in the sum of some \$1100 or \$1200. On being asked for payment, he replied he had no money, but had the promise of a note of \$900 from Camp & Randell, payable in four months, and he would give that to Moul to get discounted and use the money. The latter answered he did not want the note, but that Hunter should get it discounted and give him the money. To this Hunter replied that he was a stranger, and could not get it discounted, but Moul should take the note and get it discounted, and he, Hunter, would stand for it and see it was paid. Moul assented to this. The note was made payable to him and sent to him. It was not endorsed by Hunter. Moul had it discounted at bank and received the proceeds. When it matured, it was protested for non-payment, and taken up by Moul. In lieu thereof, and soon thereafter, Moul took from Camp & Randell their two drafts of \$450 each, payable at twenty and thirty days respectively, and wrote Hunter, informing him of the fact, but received no answer. The draft first falling due was paid at maturity, the other was protested for non-payment, and Moul wrote Hunter, informing him thereof. This draft remained in the hands of Moul. Treating it as no payment, he sought to recover of Hunter on the original account, a sum equal to the amount of the draft.

The contention before the referee was whether the circumstances under which Moul took the note, or his subsequent action in relation thereto, compelled him to apply it as a payment on the account against Hunter. There was no express agreement to accept the note as payment, nor to give time for the payment of the account. The referee found that the note was not taken by Moul as absolute payment of so much of the indebtedness of Hunter, and technically not as collateral security therefor, but, inasmuch as paper so held has been called collateral by the courts, he treated it as such. He further found Moul was guilty of no negligence in failing to collect the note, and that he did not so convert it to his own use as to bar

his right to recover of Hunter, and awarded judgment in favor of Moul, from which judgment Hunter appealed.

The opinion of the court was delivered by

MERCUR, J.—The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred: *Leas v. James*, 10 S. & R. 307; *McGinn v. Holmes*, 2 Watts 121; *Weakly v. Bell*, 9 Id. 273; *McIntyre v. Kennedy*, 5 Casey 448; *Brown v. Scott*, 1 P. F. Smith 357; *Logue v. Waring & Co.*, 4 Norris 244.

When the transfer of a note is a conditional payment, it is necessary to inquire what the true condition was, and if not fulfilled by the person accepting it, what injury, if any, has resulted from the breach. The cases are not in harmony as to the effect of a failure to present the note of a third person, and give notice of its dishonor, when no injury therefrom has resulted to the debtor. We shall not attempt to review them, but refer to some which we think correctly rule this case. Great regard must be had to the character of the transaction. If the debtor endorse the note, a more stringent rule prevails as to notice than if he transferred it by delivery only. When the guarantee is absolute, that a specific act shall be done by another, it was said in *Vinal v. Richardson*, 13 Allen 521, demand and notice need not be averred, although the want of them may be a defence on the ground of negligence to the extent of the resulting injury. One who has merely guaranteed it, but whose name is not on the bill or note, is not in general entitled to notice of non-payment: Chitty on Bills 498. So on page 441, it is further said, in general if the bill or note be given as collateral security, and the party delivering it were no party to it, either by endorsing or transferring it by delivery when payable to bearer, but merely caused it to be drawn or endorsed or delivered over by a third person as security, or has merely guaranteed the payment, it has been considered that he is not within the custom of merchants an endorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liabilities by the neglect of the holder to give him such notice, unless

he can show by express evidence, or by inference, that he has actually sustained loss or damage by the omission. The reason is, when a person delivers over a bill to another without endorsing it, he does not subject himself to the obligations of the law merchant, and cannot be sued on the bill. As he does not subject himself to the obligation, he is not entitled to the advantages. If he can prove he has sustained damages, then he is discharged only to the extent of such actual damages: *Id.* The guarantor of a note does not stand in the same situation as parties to it. His obligation is in the nature of an insurance of the debt, and there is no need of the same proof to charge him as if he was an endorser. The necessity of demand in order to charge the endorser of a bill is solely grounded on the custom of merchants, and applies only to actions against the endorser on the bill itself. It does not apply when the guarantor is not an endorser: *Gibbs v. Cannon*, 9 S. & R. 201; *Overton v. Tacey*, 14 Id. 311; *McLughan v. Bovard*, 4 Watts 308. The law is clearly stated in 2 Parsons on Bills 184, where it is said if paper be transferred by delivery only as security for a pre-existing debt, and it is dishonored while in the hands of the transferee, it affects in no way the debt it was intended to secure. The original liability remains what it was, and upon dishonor of the paper, it is not even necessary to give him notice thereof as an endorser, but the debtor may show in defence any injury he has sustained by the actual laches of the creditor. Nor does the fact that the collaterals were exchanged for other securities, which were ultimately found worthless, change the liability unless it is further shown that a loss resulted to the owners of the collaterals by reason of such exchange: *Girard Fire and Marine Ins. Co. v. Marr*, 10 Wright 504.

The name of the plaintiff in error was neither in nor on the note. It was not payable to bearer. He was in no sense a party to it. With a view that the proceeds when paid should discharge an amount of his indebtedness equal thereto, he caused it to be made payable to his creditor and put into his hands. Through no fault of that creditor it was not paid. It is not shown that it could, at any time, have been collected of the makers. The acceptance from the makers of their two drafts was no payment, but did result in the payment of one-half the amount. Having sustained no loss or damage by any act of his creditor, the plaintiff in error has no just cause of complaint at being still held liable for his indebted-

ness. The creditor was not obliged to give up the unpaid draft before bringing this suit. It is not shown to be of any value, but if valuable he has a right to retain all the securities in his hands until he obtains satisfaction of the debt due him.

Judgment affirmed.

The general rule is now well settled in accordance with the doctrine announced in the particular case, that the taking of a note of the debtor or of a third person, is not payment unless it is so agreed. This principle has been affirmed in most of our courts, and has been sustained as follows: U. S. Sup. Court: *The Kimball*, 3 Wall. 37; *Peter v. Beverly*, 10 Pet. 532. Alabama: *Myatts v. Bell*, 41 Ala. 222; *Lee's Adm'r v. Fontaine*, 10 Id. 755; *Fickling v. Brewer*, 38 Id. 685; *McCrary v. Carrington*, 35 Id. 698. Arkansas: *Brugman v. McGuire*, 32 Ark. 733. California: *Ponce v. McElvy*, 47 Cal. 154. Colorado: *Collins v. Dawley*, 4 Col. 138. Connecticut: *Dougal v. Cowles*, 5 Day 516; *Davidson v. Bridgeport*, 8 Conn. 477; *Bill v. Porter*, 9 Id. 31. Florida: *May v. Gamble*, 14 Fla. 467. Illinois: *Archibald v. Argall*, 53 Ill. 309; *White v. Jones*, 38 Id. 159; *Rayburn v. Day*, 27 Id. 46. Indiana: *Maxwell v. Day*, 45 Ind. 509; *Ritenour v. Mathews*, 42 Id. 7; *Jeffries v. Lamb*, 73 Id. 202. Iowa: *Farwell v. Grier*, 38 Iowa 83; *Huse v. McDaniels*, 33 Id. 406; *Kephart v. Butcher*, 17 Id. 240. Kansas: *Medberry v. Soper*, 17 Kans. 369; *Shepard v. Allen*, 16 Id. 182; *McCoy v. Haslitt*, 14 Id. 430. Louisiana: *Walton v. Bemiss*, 16 La. 140, 143. Maryland: *Haines v. Pearce*, 41 Md. 221; *Hoopes v. Strasburger*, 37 Id. 390. Michigan: *Gardner v. Gorham*, 1 Doug. 507; *Hotchin v. Secor*, 8 Mich. 494. Minnesota: *Daly v. Proetz*, 20 Minn. 411; *Goenen v. Schroeder*, 18 Id. 66; *McArdle v. McArdle*, 12 Id. 98; *Keough v. McNitt*, 6 Id. 513. Mississippi: *Wadlington v. Covert*, 51 Miss. 631; *Guion v. Doherty*, 43 Id. 553, 554. Missouri: *Leabo v.*

Goode, 67 Mo. 126; *Howard v. Jones*, 33 Id. 583; *Appleton v. Kennon*, 19 Id. 637. Nebraska: *Young v. Hibbs*, 5 Neb. 433. New Hampshire: *Ladd v. Wiggin*, 35 N. H. 421, 426; *Randlet v. Herren*, 20 Id. 102; *Clark v. Draper*, 19 Id. 423; *Smith v. Smith*, 27 Id. 244. New Jersey: *Wildrick v. Swain*, 34 N. J. Eq. 167; *Hutchinson v. Swartsweller*, 31 Id. 205; *Freeholders v. Thomas*, 20 Id. 41. Ohio: *Sutliff v. Atwood*, 15 Ohio St. 186, 198; *McNaughten v. Partridge*, 11 Ohio 223, 232. Pennsylvania: *Leas v. James*, 10 S. & R. 307; *McGinn v. Holmes*, 2 Watts 121; *Brown v. Scott*, 51 Penn. St. 357; *League v. Waring*, 85 Id. 244. Rhode Island: *Wheeler v. Schroeder*, 4 R. I. 388. South Carolina: *Thomas v. Kelly*, 3 S. C. (N. S.) 214; *Mars v. Conner*, 9 Id. 76; *Gardner v. Hust*, 2 Rich. 601. Tennessee: *Andrews v. German National Bank*, 53 Tenn. 211, 222; *Union Bank v. Smiser*, 33 Id. 501, 514. Virginia: *Blair v. Wilson*, 28 Gratt. 165. West Virginia: *Stephenson v. Rice*, 12 W. Va. 575; *Dunlap v. Shanklin*, 10 Id. 662. Wisconsin: *Aultman v. Jett*, 42 Wis. 488; *Matteson v. Ellsworth*, 33 Id. 488; *Paine v. Voorhees*, 26 Id. 522. These cases recognise the authority of *Clark v. Mundal*, 1 Salk. 124, in which Lord Chief Justice Holt declared that "a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so."

In a recent case in Indiana, the distinction is taken between a promissory note negotiable by the law merchant, and one not negotiable. And it is held that if the note was negotiable, its execution and delivery must be regarded as

a payment of the prior debt, unless there was an agreement to the contrary. If it was not negotiable, it is not to be regarded as payment unless so agreed : *Krutsinger v. Brown*, 12 Reporter 395. In New York, while the rule is that the note of a third person is not to be considered as payment unless so agreed between the parties (*Board of Education v. Fonda*, 77 N. Y. 350, 362), yet if the creditor receives the debtor's own paper, it cannot be regarded as payment of the pre-existing debt, although it was expressly agreed that it should be so considered. The reason given for this distinction being that, in the latter case, there is no consideration to support such a promise : *Frisbie v. Larned*, 21 Wend. 452 ; *Cole v. Sackett*, 1 Hill 516 ; *Waydell v. Luer*, 5 Id. 449 ; s. c. 3 Denio 410 ; *Rice v. Dewey*, 54 Barb. 455.

On the other hand, in Maine, Massachusetts and in Vermont, the courts repudiating the rule, elsewhere so generally recognised, have always held to the theory that a note of the debtor or of a third person, is to be considered as having been taken in payment of a pre-existing indebtedness, unless otherwise agreed upon. In the absence of agreement to the contrary, it is *prima facie* payment of the indebtedness.

Maine : *Strang v. Hirst*, 61 Me. 9 ; *Paine v. Dvinel*, 53 Id. 53 ; *Gooding v. Morgan*, 37 Id. 419 ; *Descadillas v. Harris*, 8 Id. 298 ; *Varner v. Nobleborough*, 2 Id. 121. Massachusetts : *Thacher v. Dinsmore*, 5 Mass. 299 ; *Maneely v. McGee*, 6 Id. 143 ; *Geodenow v. Tyler*, 7 Id. 36, 45 ; *Johnson v. Johnson*, 11 Id. 359, 362 ; *Fowler v. Bush*, 21 Pick. 230 ; *Ely v. James*, 123 Mass. 36. Vermont : *Hutchins v. Olcott*, 4 Vt. 549 ; *Torrey v. Baxter*, 13 Id. 452 ; *Farr v. Stevens*, 26 Id. 299 ; *Collamer v. Langdon*, 29 Id. 32 ; *Wait v. Brewster*, 31 Id. 516.

But the presumption of payment is not applicable in the case of non-negotiable notes : *Dutton v. Kendrick*, 12 Me.

381 ; *Edmond v. Caldwell*, 15 Id. 340 ; *Bartlett v. Mayo*, 33 Id. 518 ; *Greenwood v. Curtis*, 4 Mass. 93 ; *Howland v. Coffin*, 9 Pick. 54.

It is to be noted, too, that it is held that if a negotiable note is given in a foreign state, it will not be considered as having been received in payment of the original indebtedness, unless such was its effect in the state or country where it was given : *Descadillas v. Harris*, 8 Me. 298. And if the negotiable paper received is not binding on all the parties previously liable, it is said that the presumption of payment may be considered as repelled : *Fowler v. Ludwig*, 34 Id. 455. So, where an unaccepted bill of exchange is received, it is not considered as having been received in payment : *Strang v. Hirst*, 61 Id. 9. And in a late case in Vermont, it is held that although the reception of negotiable paper is *prima facie* payment, it is not payment in the sense of extinguishing the creditor's claim upon collateral securities given for the original debt, unless it was so agreed : *Pinney v. Kimpton*, 46 Vt. 80.

It is worthy of remark, that in *Aultman v. Jett*, 42 Wis. 488, Mr. Chief Justice RYAN, a very able jurist, considered it the better rule to hold that the taking of a negotiable note should be considered as *prima facie* payment, although acquiescing in the contrary theory upon the principle of *stare decisis*. And it must be conceded that the reason given by Chief Justice SHAW in Massachusetts, for the rule there maintained is not without force. That reason was that it was equally convenient to the creditor to sue on the note as on the original consideration, so that there was no reason for considering the original simple contract as still in force. That, therefore, a presumption arose that it was intended the note should be deemed a satisfaction of the original debt. See his opinion in *Curtis v. Hubbard*, 9 Met. 323. The recent decision of the Supreme Court

of Indiana in *Krutsinger v. Brown*, *supra*, seems to bring the courts of that state into line with those of Maine, Massachusetts and Vermont on this subject.

It is agreed upon all hands that fraudulent or forged negotiable paper will not be allowed to have the effect of payment, although it was originally received as payment. The fraud practised vitiates the agreement of the parties to treat it as payment, or the presumption of the law that it was intended to be received as payment. This is the rule in England and America: *Stedman v. Gooch*, 1 Esp. 3; *Scholefield v. Templer*, 4 De Gex & J. 429; *Ritter v. Singmaster*, 73 Penn. St. 400; *Emerine v. O'Brien*, 36 Ohio St. 491, 496; *Hutchins v. Olcutt*, 4 Vt. 549; *Wemet v. Missisquoi Lime Co.*, 46 Id. 458; *Wait v. Brewster*, 31 Id. 516.

It is also agreed, even in those states where the delivery of a promissory note is not payment unless so agreed, that where a bond is given for a contract debt, the debt is thereby extinguished, the former being a higher security than the latter: *McNaughten v. Partridge*, 11 Ohio, 223, 232; *Bank of Missouri v. Tesson*, 1 Mo. 617; *Vaughn v. Lynn*, 9 Id. 770; *Settle v. Davidson*, 7 Id. 604; *Hall v. Hopkins*, 14 Id. 450.

If, instead of being taken as payment the negotiable paper is transferred as conditional payment, or as collateral security for an existing debt, a subsequent recovery on such debt will depend on the fact whether or not any laches has been committed with regard to the transferred security. And it has been held that, where a draft drawn by a third person is endorsed by the debtor, and by him sent to the creditor, to be applied when paid, the creditor cannot sue on the original debt if he neglects to take the necessary steps to hold the debtor liable as endorser: *Jennison v. Parker*, 7 Mich. 355. See too, *Dayton v. Trull*, 23 Wend. 345; *Tobey v. Bar-*

ber, 5 Johns. 68; *Smith v. Wilson*, Andrews 187, 228; *Chamberlyn v. Delarive*, 2 Wils. 353; *Ward v. Evans*, 2 Ld. Raym. 928. Where one receives a draft as conditional payment, the duty devolves on the creditor of doing everything which is necessary to fix the liability of the parties: *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Briggs v. Persons*, 39 Id. 400. And the rule is, that if the creditor receives a note or bill as collateral, and loss occurs through his laches, he must make it good: *Lee v. Baldwin*, 10 Ga. 208; *Trotter v. Crockett*, 2 Porter 401; *Powell v. Henry*, 27 Ala. 612; *Russell v. Hester*, 10 Id. 535; *Darnall v. Morehouse*, 45 N. Y. 65; *Whitin v. Paul* (Supreme Court of Rhode Island), 11 Reporter 316; *Wakeman v. Goudy*, 10 Bosw. (N. Y.) 208; *Hoard v. Garner*, 10 N. Y. 261; *Slevin v. Morrow*, 4 Ind. 425; *Lomberton v. Windom*, 12 Minn. 232; *Lyon v. Huntingdon Bank*, 12 S. & R. 61; *Williams v. Price*, 1 Sim. & Stu. 581; *Ex parte Mure*, 2 Cox 63. See *Kiser v. Ruddick*, 8 Blackf. 384; *Lawrence v. McCalmont*, 2 How. 426. It is his duty to make demand of payment and to give notice of dishonor: *Wadlington v. Covert*, 51 Miss. 631, 636. But it is not necessary that he should sue on it: *Kemmil v. Wilson*, 4 Wash. C. C. 308; *Archibald v. Argall*, 53 Ill. 309; *Ripley v. Greenleaf*, 2 Vt. 129; *Bank of Penna. v. Potius*, 10 Watts 148; *Wadlington v. Covert*, *supra*. In a recent case in the United States Circuit Court (W. D. of Tennessee), where an insurance company had taken a draft in payment of the premium, and the policy contained a condition that it should be void if the draft was not paid when due, "without notice to any party or parties interested therein," it was held that the company was nevertheless bound to comply with the rules of commercial law as to negotiable paper, as to presentation and payment: *Pendleton v. Knickerbocker Life Ins. Co.*, 7 Fed. Rep. 169. But it is

said that proof of due diligence is not necessary if fraud was practised on the creditor by false representations as to the solvency of the maker, &c.: *Lake v. Gilchrist*, 7 Ala. 955; *Harton v. Scales*, Minor 166; *Nance v. Pope*, 1 Stewart 220; *Eagle Bank v. Smith*, 5 Conn. 74.

It seems to be agreed that, if a note of a third person is taken in absolute payment of a pre-existing debt, it is taken free from equities: *Mayberry v. Morris*, 62 Ala. 113; *Barney v. Earle*, 13 Id. 106; *Bank of Mobile v. Hall*, 6 Id. 639; *Bertrand v. Barkman*, 13 Ark. 150; *Bank of Republic v. Carlington*, 5 R. I. 515; *Cobb v. Doyle*, 7 Id. 550; *May v. Quimby*, 3 Bush (Ky.) 96; *Cecil Bank v. Heald*, 25 Md. 563; *Williams v. Little*, 11 N. H. 66; *Kingsland v. Pryor*, 33 Ohio St. 19; *Redlick v. Jones*, 6 Ired. (N. C.) 109; *Outhwite v. Porter*, 13 Mich. 533; *Walker v. Geissee*, 4 Whart. 252, 258; *Bardsley v. Delp*, 88 Penn. St. 420; *Knox v. Clifford*, 38 Wis. 651; *Atkinson v. Brooks*, 26 Vt. 574; *Russell v. Splater*, 47 Id. 273; *Emanuel v. White*, 34 Miss. 56; *Stevenson v. Heyland*, 11 Minn. 198; *Conklin v. Vail*, 31 Ill. 166; *Ives v. Farmers' Bank*, 2 Allen 236; *Blanchard v. Stevens*, 3 Cush. 162; *Brush v. Scribner*, 11 Conn. 388, 403; *Bond v. Central Bank*, 2 Kelly (Ga.) 92; *Swift v. Tyson*, 16 Peters 1; *Brown v. Leavitt*, 31 N. Y. 113; *Al-laire v. Hartshorne*, 21 N. J. L. 665. But a difference of opinion exists where the note is taken as security for a pre-existing debt. It has been held in some cases that the holder takes free from equities when he receives the paper under such circumstances: *Goodman v. Simonds*, 20 How. 343; *Oates v. National Bank*, 100 U. S. 239; *Gibson v. Conner*, 3 Kelly 47; *Meadow v. Bird*, 22 Ga. 246; *Exchange Bank v. Butner*, 60 Id. 654; *Best v. Crall*, 23 Kans. 484; *Succession of Dolhonde*, 21 La. Ann. 3; *Louisiana State Bank v.*

Gaiennie, 21 Id. 555; *Giovanovich v. Citizens' Bank*, 26 Id. 15; *Sackett v. Johnson*, 54 Cal. 107; *Davis v. Russell*, 52 Id. 611; *Frey v. Clifford*, 44 Id. 342; *Cobb v. Doyle*, 7 R. I. 550; *Al-laire v. Hartshorne*, *supra*. On the other hand there are many cases maintaining a contrary theory, among which may be cited the following: *Royer v. Keystone Bank*, 83 Penn. St. 248; *Lenheim v. Wilmarling*, 55 Id. 73; *Kirkpatrick v. Muirhead*, 16 Id. 117, 123; *Petrie v. Clark*, 11 S. & R. 377; *Body v. Jewsen*, 33 Wis. 402; *Bowman v. Van Kuren*, 29 Id. 209; *Jenkins v. Schaub*, 14 Id. 1; *Prentice v. Zane*, 2 Gratt. 262; *Bramhall v. Beckett*, 31 Me. 205; *Brooks v. Whitson*, 7 S. & M. 513; *Roxborough v. Messick*, 6 Ohio St. 448; *Alexander v. Springfield Bank*, 2 Met. (Ky.) 534; *Boyd v. Beck*, 29 Ala. 703, 713; *Fenouille v. Hamilton*, 35 Id. 319; *Andrews v. McCoy*, 8 Id. 926; *Bertrand v. Barkman*, 13 Ark. 150; *Rice v. Raitt*, 17 N. H. 116; *Bank v. Kent*, 15 Id. 579; *Stalker v. McDonald*, 6 Hill (N. Y.) 93; *Caddington v. Bay*, 20 Johns. 644; *Jones v. Swan*, 6 Wend. 589; *Hart v. Palmer*, 12 Id. 523; *Ruddick v. Lloyd*, 15 Iowa 441; *Ryan v. Chew*, 13 Id. 589. It is conceded, however, that if, instead of being simply received as a security, the creditor has been induced thereby to promise an extension of time, or to relinquish some advantage, or, if a new consideration appears, then the paper is held free from equities. See *Washington Bank v. Krum*, 15 Iowa 53; *Stotts v. Byers*, 17 Id. 303; *Brush v. Scribner*, 11 Conn. 388, 403; *Roxborough v. Messick*, 6 Ohio St. 448; *Alexander v. Springfield Bank*, 2 Met. (Ky.) 534; *Griswold v. Davis*, 31 Vt. 390; *Petrie v. Clark*, 11 S. & R. 377, 388; *Rosenberger v. Bitting*, 15 Penn. St. 278; *Bertrand v. Barkman*, 13 Ark. 150; *Bowman v. Millison*, 58 Ill. 36; *Paulette v. Brown*, 40 Mo. 54; *Park Bank v. Watson*, 42 N. Y. 490. So where the collateral has

been received at the time the original debt was contracted, it is held free from equities : *Bowman v. Van Kuren*, 29 Wis. 219 ; *Munn v. McDonald*, 10 Watts 270 ; *Griswold v. Davis*, 31 Vt. 390 ; *Logan v. Smith*, 62 Mo. 458. But where there are existing equities, the holder of the collateral can only recover upon it to the extent of his origi-

nal debt, although if no equities existed he would be permitted to recover the full amount of the collateral, holding the excess in trust for his original debtor : *Allaire v. Hartshorne*, 21 N. J. L. 665 ; *Atlas Bank v. Doyle*, 9 R. I. 76 ; *Bank v. Hemingray*, 34 Ohio St. 381 ; *Chicopee Bank v. Chapin*, 8 Met. 40.

HENRY WADE ROGERS.

Circuit Court, Southern District of New York.

ROSE v. STEPHENS AND CONDIT TRANSPORTATION COMPANY.

In a suit by one injured by the explosion of a boiler, against the owner of the boiler, whose servants were operating it, the mere fact of the explosion raises a presumption of negligence on the part of the owner, even though he occupied no contract relation to the party injured.

In such case the burden is upon the owner of the boiler to disprove negligence.

MOTION for a new trial.

This was an action by John C. Rose against The Stephens and Condit Transportation Company to recover damages for personal injuries caused by the explosion of a boiler. On the trial the following facts appeared. The defendant was the owner of the steamboat "Magenta," and in March 1878 leased her to D. D. Smith and others for one month, at a specified rental, the lessors to appoint and pay the engineer, fireman and pilot, and the lessees to appoint and pay the other officers and crew. The lessees used the boat for transporting passengers between Haverstraw and New York, and on one of the trips between these places, on March 23d 1878, the boiler exploded, injuring the plaintiff who was a passenger. It appeared that the explosion was caused by the corrosion of the iron composing a sheet of the steam chimney. It also appeared that the boiler had been built in 1873, that the shell of the steam chimney had been thoroughly examined in May 1877, when it was found in excellent condition ; that in June 1877 the boat had been regularly inspected and licensed for a year ; that in March 1878, before the boat was allowed to go out the engineer went inside the boiler, and inside of the steam chimney as far as he could and found no signs of decay, and that he did the same thing the Sunday before the explosion, but that no other examina-